Dato' Mohamad Salim Fateh bin Fateh Din v Nadeswaran a/l Rajah (No 2)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S23NCVC–6 OF 2001
AMELIA TEE ABDULLAH J
30 APRIL 2012

Civil Procedure — Pleadings — Statement of defence — Filing and service — Delay in filing and serving defence — Application for extension of time to file and serve defence — Whether good grounds shown for exercise of court's discretion — Whether mistake of solicitor an acceptable ground

The plaintiff claimed against the defendant damages for defamation. The writ was served at the address of the defendant's parents-in-law in Petaling Jaya. Since the defendant lived in the United Kingdom ('UK'), he objected to this service and applied to set aside the service of the writ. The plaintiff therefore had to obtain leave to issue a concurrent writ of summons for service out of jurisdiction and duly served on the defendant at his address in the UK on 7 June 2011. Appearance was entered on 20 June 2011. Time for filing and serving the defence expired on 12 July 2011. The defence had only been filed on 19 August 2011. The defendant's solicitors then filed the present application on 26 August 2011 for the court to approve the filing of the defence on 19 August 2011. The only reason given for the delay was defence counsel fault or mistake as a result of miscommunication regarding the dates for the filing of the defence. The issue that arose for consideration was whether the court should allow the defendant's application for leave to file the defence out of time. The defence was allegedly never been served on the plaintiff.

Held, dismissing the defendant's application with costs:

(1) It is not the filing of the defence but the service of the defence that is mandated under O 18 r 2(1) of the Rules of the High Court 1980 ('RHC'). The fact that the defendant had failed to serve the defence within the time period as mandated by the RHC was not in dispute (see para 24).

(2) The defendant had insisted on strict compliance with the RHC as to service. As such, the plaintiff had to engage an agent to serve the defendant in the United Kingdom. Hence, the failure of the defendant to serve a copy of the defence within the time as stated in the RHC was incomprehensible taking into account his own insistence that there should be due compliance with the rules (see para 40).

(3) No good ground had been shown for the delay. It is trite law that the mistake of the solicitor is not a good ground albeit the court was unable to see how in the circumstances there could be any mistake or miscommunication. The court was thus unable to see how a plea by the defendant's solicitors that the defendant should not be made to suffer as a result of the solicitor's mistake could amount to a good ground for the exercise of the court's discretion (see para 41).

(4) If the defendant had indeed suffered as a result of the admitted mistake of his solicitor, his proper remedy was against the said solicitor. There was no basis to exercise the court's discretion to allow the defendant an extension of time to serve his defence (see para 42).

[Bahasa Malaysia summary

Plaintif menuntut terhadap defendan ganti rugi untuk fitnah. Writ diserahkan ke alamat ibu bapa mertua defendan di Petaling Jaya. Memandangkan defendan tinggal di United Kingdom ('UK'), dia membantah kepada penyerahan ini dan memohon untuk mengenepikan penyerahan writ. Plaintif oleh itu terpaksa memperolehi izin untuk mengeluarkan writ saman serentak untuk penyerahan luar bidang kuasa dan diserahkan dengan sewajarnya ke atas defendan di alamat dia di UK pada 7 Jun 2011. Kehadiran dimasukkan pada 20 Jun 2011. Masa untuk pemfailan dan menyerahkan pembelaan tamat pada 12 Julai 2011. Pembelaan hanya difailkan pada 19 Ogos 2011. Peguam defendan kemudiannya memfailkan permohonan ini pada 26 Ogos 2011 untuk Mahkamah meluluskan pemfailan pembelaan pada 19 Ogos 2011. Satu-satunya alasan yang diberikan untuk kelewatan adalah kesalahan atau kesilapan peguam pembela akibat salah faham berkaitan tarikh-tarikh untuk pemfailan pembelaan. Isu yang berbangkit untuk pertimbangan adalah sama ada mahkamah patut membenarkan permohonan defendan untuk izin memfailkan pembelaan di luar masa. Pembelaan didakwa tidak diserahkan ke atas plaintif.

Diputuskan, menolak permohonan defendan dengan kos:

(1) Ia bukan pemfailan pembelaan tetapi penyerahan pembelaan yang dimandatkan di bawah A 18 k 2(1) Kaedah-Kaedahn Mahkamah Tinggi 1980 ('KMT'). Fakta bahawa defendan telah gagal untuk menyerahkan pembelaan dalam tempoh masa seperti yang di mandatkan oleh KMT tidak dipertikaikan (lihat perenggan 24).

(2) Defendan berkeras atas pematuhan ketat dengan KMT terhadap penyerahan. Oleh itu, plaintif terpaksa melantik ejen untuk menyerahkan kepada defendan di United Kingdom. Maka, kegagalan defendan untuk menyerahkan salinan pembelaan dalam masa yang ditetapkan di dalam KMT tidak dapat difahami mengambil kira

desakannya sendiri bahawa ia patut terdapat kepatuhan sewajarnya dengan kaedah-kaedah (lihat perenggan 40).

(3) Tiada alasan ditunjukkan untuk kelewatan tersebut. Adalah undang-undang nyata bahawa kesilapan peguam bukan alasan baik meskipun mahkamah tidak dapat melihat bagaimana dalam keadaan terdapat apa-apa kesilapan atau salah faham. Mahkamah oleh itu tidak dapat melihat bagaimana pli oleh peguam defendan bahawa defendan tidak patut menderita akibat kesilapan peguam boleh merupakan alasan baik untuk pelaksanaan budi bicara mahkamah (lihat perenggan 41).

(4) Jika defendan sememangnya menderita akibat pengakuan kesilapan oleh peguamnya, remedi wajarnya adalah terhadap peguam tersebut. Tidak terdapat asas untuk melaksanakan budi bicara mahkamah untuk membenarkan defendan pelanjutan masa untuk menyerahkan pembelaannya (lihat perenggan 42).]

Notes

For cases on statement of defence, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 6200–6201.

Cases referred to

Arbuthnot Latham Bank Ltd & Others v Trafalgar Holdings Ltd & Anor [1998] 2 All ER 181; [1998] 1 WLR 1426, CA (refd)

Gurdev Kaur a/p Bhag Singh v BSN Commercial Bank (M) Bhd [2002] MLJU 643; [2003] 1 CLJ 429, CA (folld)

Idris bin Hj Salleh v Federal Auto Holdings Bhd [1979] 2 MLJ 141, HC (folld)

Ketteman and Others v Hansel Properties Ltd [1988] 1 All ER 38, HL (refd)

Ong Guan Teck & Ors v Hijjas [1982] 1 MLJ 105, HC (refd)

Soh Keng Hian v American International Assurance Co Ltd [1996] 1 MLJ 191, CA (refd)

Tang Kwor Ham & Ore v Pengurusan Danaharta Nasional Bhd & Ors [2006] 5 MLJ 60, CA (refd)

Tractors Malaysia Bhd v Southern Estates Sdn Bhd & Anor [1984] 1 MLJ 118; [1984] 1 CLJ 154, FC (refd)

Trustees of Leong San Tong Kongsi (Penang) Registered & Anor v Lee Boon Tin [1998] 4 MLJ 373; [1998] 4 CLJ 368, CA (refd)

Legislation referred to

Arbitration Act 1952 (repealed by the Arbitration Act 2005) s 23

Rules of the High Court 1980 O 18 r 2, 2(1), O 25 r 2, O 34 r 2, O 69 rr 2, 4(1)

Dhinesh Bhaskaran (Denise Tan Kae Ji with him) (Sheam Delamore & Co) for the plaintiff.

G Mahendran (Ashokvijay Sanghirajka with him) (Mahendran & Aravind) for the defendant.

Amelia Tee Abdullah J:

GROUNDS OF DECISION (ENCL 18)

[1] The plaintiff, *Dato' Mohamad Salim bin Fateh Din's* claim against the defendant, *Nadeswaran a/l Rajah*, is for general, special and exemplary damages for damage caused to him as a result of the defendant's publication of defamatory statements against him. The writ of summons and statement of claim of the plaintiff was filed on 31 January 2011.

[2] On 26 September 2012, the court had dismissed an application by the defendant for extension of time to file his statement of defence with costs to be taxed unless otherwise agreed.

BACKGROUND

[3] On 28 February 2011, the defendant was granted leave to enter conditional appearance and to apply to set aside the service of the writ of summons and statement of claim on him, inter alia, on the ground that despite the plaintiff's solicitors having been informed in writing about the defendant's address in the United Kingdom, the documents had been served at the address of the defendant's parents-in-law in Petaling Jaya.

[4] On 11 May 2011, the defendant's application to set aside service of the writ and statement of claim (encl 6) was withdrawn with costs of RM2000 to be costs in the cause. At the same time, the plaintiff's application for leave to issue a concurrent writ of summons for service out of jurisdiction was allowed. The said writ was duly served on the defendant at his address at 387, Ilford lane, IGI 2SL Ilford, Essex, England on 7 June 2011. Appearance was entered on 20 June 2011.

[5] On 4 July 2011, the case was called for case management in the presence of Mr Dhinesh Bhaskaran for the plaintiff and in the absence of the defendant. However, the court was informed by the plaintiff's solicitors that they had mistakenly informed defendant's solicitors that the case management date was on 7 July 2011. They then sought another case management date and undertook to inform defendant's solicitors of the next date.

[6] The case was called again for case management on 27 July 2011 in the presence of Mr Dhinesh Bhaskaran for the plaintiff. The defendant's solicitors were again absent despite a written notice to them which was acknowledged received by their legal firm. Since the defendant was served on 7 June 2011, the defendant had 21 days to enter appearance and thereafter 14 days to serve his

defence. The court was informed that the time for filing and serving the defence had expired on 12 July 2011. In light of the fact that no defence had been served on the plaintiff as at 27 July 2011, counsel for the plaintiff had asked the court to set the case down for hearing. The court then fixed 20 October 2011 for full hearing and 23 August 2011 for case management for the plaintiff to file his bundle of documents.

[7] When the case was called for case management on 23 August 2011, the court was informed by counsel for the defendant that they would be filing an application for abridgement of time. Following that, the defendant through Messrs TK Wong, Tan & Associates, had filed a summons in chambers (encl 18) on 26 August 2011 for the court to approve the filing of the defence on 19 August 2011.

THE AFFIDAVIT IN SUPPORT — ENCL 19

[8] In his affidavit in support of the application (encl 19), Mr Mahendran a/l Gnasamoothy avers that he was tasked with communicating with the defendant in the United Kingdom and preparing the statement of defence. He apologised for the delay in filing the defence. The reasons for the delay can be seen in para 5 of his affidavit (encl 19) which reads as follows:

> 5. Saya dengan rendah dirinya memohon maaf keatas kelewatan pemfailan yang sama yang disebabkan oleh saya. Saya tidak menyengajakan yang sama, tetapi yang sama *disebabkan kesalah-fahaman saya keatas komunikasi-komunikasi mengenai tarikh-tarikh pemfailan Pembelaan.* Kelewatan yang disebabkan adalah hanya 1 1/2 bulan sahaja dan tidak memprejudiskan Guaman ini, Defendan atau tarikh Bicara yang telah Ditetapkan. Dipercayai juga bahawa tarikh Bicara tersebut adalah akan ditukarkan. (Emphasis added.)

[9] Mr Mahendran a/l Gnasamoothy states that the delay in filing the defence does not prejudice this suit and is only a procedural non-compliance which prejudice, if any, can be compensated with costs. And in para 8 he states that if the hearing is allowed to proceed without the defendant's defence, the defendant would be deprived of an opportunity to defend himself in a contentious civil suit. In the interests of justice, he prayed that the defendant be not prejudiced by the delay caused by his counsel, namely himself.

THE PLAINTIFF'S AFFIDAVIT IN REPLY — ENCL 21

[10] The plaintiff in his affidavit in reply (encl 21) states for the record that the plaintiff had never been served with the defence at any point in time. He further states that he had been informed by his solicitors and verily believes that the defendant and his counsel were aware of the dateline to file the defence at

all material times. His averments as regards the timelines in this case are very pertinent in the determination of this application and are thus repeated below at some length:

(a) the plaintiff's suit was filed on 31 January 2011. To ensure that the defendant was aware of the suit that had been filed, the plaintiff's solicitors had left a copy of the unsealed writ and statement of claim on the defendant's last known address at No 33, Jalan SS5B/5, Petaling Jaya and e-mailed a copy to the defendant's e-mail address at rnadeswaran@gmail.com. The No 33, Jalan SS5B/5 is the address stated in the defendant's identity card as discovered from a National Registration Department search. The e-mail address is the defendant's personal e-mail address as displayed at the website promoting the defendant's book entitled 'Some Untold Stories'. At that stage, the plaintiff was not aware of the defendant's address in England;

(b) after the sealed writ and statement of claim were extracted on 21 February 2011, a copy of the same were left at the 33, Jalan SS5B/5, Petaling Jaya address together with a covering letter dated 21 February 2011 informing the defendant of the return date on 1 March 2011 (exh MS5). A copy of the writ and statement of claim were also e-mailed to the defendant. At that stage, the plaintiff was still not aware of the defendant's address in England;

(c) on 23 February 2011, the plaintiff was informed by his solicitors that that they had received the defendant's letter dated 8 February 2011 informing them of the defendant's address in England (exh MS6);

(d) on 1 March 2011, the defendant's counsel was present in court for the first case management. He informed the court that conditional appearance had been filed in court and he had obtained leave to apply to set aside the service of the writ and statement of claim;

(e) on 11 March 2011, the defendant filed an application to set aside the service of the defendant's writ and statement of claim (encl 6);

(f) vide a letter dated 31 March 2011, the plaintiff's solicitors asked the defendant's solicitors whether they had instructions to accept service on behalf of the defendant (MS7). By letter dated 5 April 2011, the defendant's solicitors stated that they did not have instructions to accept service (MS8);

(g) on 29 April 2011, the plaintiff's solicitors filed an application (encl 11) to serve a concurrent writ of summons to be served out of jurisdiction on the defendant;

(h) on 11 May 2011, the defendant withdrew encl 6 and the court allowed encl 11;

(i) on 7 June 2011, a process server in England served the concurrent writ of summons to be served out of jurisdiction on the defendant; and

(j) the defendant filed a memorandum of appearance on 20 June 2011.

[11] From the above recounting of the events that had transpired, the plaintiff states that the defendant has had full knowledge of the contents of the statement of claim and ample time to prepare his defence since 31 January 2011. Further, the defendant and his solicitors would be well aware that the dateline to file the defence was by 11 July 2011.

[12] Vide a letter dated 4 July 2011 (exh MS9), the plaintiff's solicitors had informed the defendant's solicitors that the court had directed the defendant to file its defence by the next case management date on 27 July 2011. The plaintiff's solicitors had also informed the defendant's solicitors that the court wished to move the matter expeditiously and parties should be prepared for tight schedules and early trial dates.

[13] On 27 July 2011, defendant's counsel failed to attend case management. The court fixed 23 August 2011 for further case management and 20 October 2011 for full hearing. The plaintiff's solicitors duly communicated this to defendant's solicitors vide letter dated 27 July 2011 (exh MS10).

[14] When the case was called for case management on 23 August 2011, the defendant's counsel who was now present informed the court for the first time that the defendant would be filing an application for extension of time to file his defence.

[15] On 29 August 2011, the defendant's solicitors faxed a copy of the defendant's application to the plaintiff's solicitors. *At this point in time, eight months had lapsed since the defendant first received the unsealed writ and statement of claim and more than 1 1/2 months had passed since the defendant was served by the appointed process server in England.*

[16] The plaintiff avers that at all material times the defendant or his solicitors had not served on the plaintiff's solicitors the defence or any request for extension of time to serve the defence.

[17] As such, it is averred that the defendant had deliberately refrained from filing his defence and was now filing the application purely to delay the progress of the suit. The plaintiff thus states that the defendant's application would cause him injustice and would cause further unjustified and unreasonable delays, thus denying the plaintiff the right to restore his integrity and reputation at the earliest opportunity.

[18] And lastly, the plaintiff states that if in fact the defendant did not file his defence on time due to the mistake of his counsel, then the defendant's recourse is against his own counsel.

THE DEFENDANT'S COUNSEL AFFIDAVIT IN REPLY — ENCL 23

[19] The defendant's counsel has filed an affidavit in reply (encl 23) on behalf of the defendant, which he says he is authorised so to do. In his affidavit, he admits that there was a mistake as to the dates of filing had led to the delay in filing the defence, however such delay had not caused any delay in this suit as the date fixed for hearing on 22 October 2011 had been vacated by the court.

[20] Learned counsel for the defendant had deposed that various issues raised by the plaintiff in relation to the service of the writ and statement of claim were 'tidak betul dan telah diselesaikan di Mahkamah Mulia ini dengan kos sebanyak RM 2000 diberikan kepada Defendan kerana kegagalan-kegagalan Plaintif dalam menghantarserahkan Writ Saman dengan betul'. The afore-stated averment is *clearly inaccurate* as court records reveal that upon learned counsel for the plaintiff confirming that the plaintiff had not served the defendant at the IC address, defence counsel had withdrawn encl 6 and the court had ordered that the agreed costs of RM2,000 be *costs in the cause*.

[21] Learned counsel for the defendant, in deposing the affidavit in reply, further states that the plaintiff had not shown any justification, reasons or prejudice that would be occasioned by the delay in filing the defence.

[22] And lastly, counsel avers that there are merits in the defence as the defendant has denied the allegations of defamation. He states that the alleged defamation had been published in Free Malaysia Today but the plaintiff had not brought any suit against that publication. He further claims that this is the first case in Malaysia involving defamation through Twitter or social media networking websites.

THE FINDINGS

[23] The issue that arose for consideration was whether the court should allow the defendant's application for leave to file the defence out of time. The defence had only been filed on 19 August 2011. It has allegedly never been served on the plaintiff. Order 18 r 2 of the RHC reads as follows:

> 2. (1) Subject to paragraph (2), a defendant who enters an appearance in, and intends to defend, an action must, unless the Court gives leave to the contrary, *serve a defence* on the plaintiff before the expiration of 14 days after the time limited for appearing or after the statement of claim is served on him, whichever is the later. (Emphasis added.)

[24] The court agrees with the submissions of learned counsel for the plaintiff that it is not the filing of the defence but the service of the defence that is mandated under O 18 r 2(1). The court notes that the defendant has not disputed the plaintiff's complaint that the defendant had never *at any time* served the statement of defence on the plaintiff.

[25] The fact that the defendant had failed to serve the defence within the time period as mandated by the RHC is not in dispute. What are the factors to be considered when considering an application to serve out of time a pleading or other document as provided by the Rules of the High Court 1980?

[26] In the case of *Trustees of Leong San Tong Kongsi (Penang) Registered & Anor v Lee Boon Tin* [1998] 4 MLJ 373; [1998] 4 CLJ 368, the respondent's premises were demolished by the appellants in 1987. However, the respondent sued the appellants for damages for trespass and loss of chattels only in 1993, about five years and 11 months later. Apart from that, for about one year and nine months after the pleadings were closed on 28 October 1993, the respondent did nothing to set the case for hearing. There was also delay in filing for, and serving, the summons for directions. The appellants applied to strike out the respondent's writ and statement of claim for want of prosecution on the grounds that the respondent was guilty of inordinate and inexcusable delay within the meaning of O 34 r 2 and O 25 r 2 of the RHC 1980 and that such delay had prejudiced them in their defence as some of their employees who were involved in the demolition exercise had left their employment and could not be traced.

[27] The respondent did not offer any credible excuse for the delay. The learned judge had ruled that whilst the respondent was guilty of inordinate and inexcusable delay, he was not guilty of 'grossly inordinate delay'. The application for striking out was dismissed. On appeal, the main question for consideration was whether, in the circumstances, the application to strike out the writ and statement of claim should have been allowed by the trial court.

[28] In *Trustees of Leong San Tong Kongsi*, the Court of Appeal, in allowing the appeal, had pointed out that there is a backlog of cases due to unnecessary delay. His Lordship Mokhtar Sidin JCA had stressed the importance of parties observing the time limits as provided by law so that cases could be brought to trial within time. The only excuse given by the respondent was that the delay was not deliberate and not inordinate. The Court of Appeal found that the respondent had not taken any steps to dispose of the litigation within reasonable time. His Lordship referred to Lord Woolf MR in *Arbuthnot Latham Bank Ltd & Anor v Trafalgar Holdings Ltd & Others* [1998] 2 All ER 181; [1998] 1 WLR 1426 where it was stated as follows:

The existing rules contain time limits which were designed to achieve the disposal of litigation within a reasonable time scale. *Those rules should be observed.* And further on:

> The change in culture which was already taking place would enable courts to recognise for the future, more readily than heretofore, that *a wholesale disregard of the rules was an abuse of process.*
>
> While *an abuse of process* could be within the first category identified in *Birkett v James*, it was also a separate ground for striking out or staying an action, which *did not depend on the need to show prejudice to the defendant or that a fair trial was no longer possible.* (Emphasis added.)

[29] In the case of *Ong Guan Teck & Ors v Hijjas* [1982] 1 MLJ 105, the appellant sought to have the period of six weeks limited by O 69 r 4(1) of the RHC 1980 for an application to remit an award under s 23 of the Arbitration Act 1952 extended on the ground that there was a divergence of opinion on the interpretation of the award between the parties and the applicants had only realised this on 23 June 1981. It was only after this that the applicants felt that there was 'genuine doubt' in their minds whether the various amounts paid by them had been taken into account by the arbitrator in his award. Since the award was made and published on 2 April 1981, the applicants filed a notice of originating motion for extension of time on 16 September 1981.

[30] In dismissing the application, Hashim Yeop A Sani J (as he was then) had held as follows:

> It is trite law that the court has an unfettered discretion to grant or *refuse an extension of time. The first principle is that the rules of court must prima facie be obeyed and in order to justify an extension of time, there must be some material on which the court can exercise its discretion in favour of the applicant.* For otherwise the party in breach of the rules would have an unfettered right to extension of time which would defeat the very purpose and object of the rules on limitation of period.
>
> In considering whether to grant or refuse extension of time the length of time that has elapsed is always a material factor to be considered by the court exercising the discretion. On the facts of this case I was not able to honestly say that there was any valid ground for the delay and therefore refused the application for extension of time. (Emphasis added.)

[31] The case of *Ong Guan Teck & Ors v Hijjas* has been referred with approval by the Court of Appeal in *Tang Kwor Ham & Ore v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60. The Court of Appeal had held that the necessity for the court to scrutinise the material before it to ensure that there is a good arguable case on the merits warranting the exercise of discretion in the applicant's favour *is in addition to the requirement that the applicant must provide a satisfactory explanation for the delay.*

[32] Another case which dealt with this same point is the Court of Appeal case of *Soh Keng Hian v American International Assurance Co Ltd* [1996] 1 MLJ 191. In this case, the appellant had filed an appeal against the decision of the High Court at Muar within time. However, he had overlooked serving it on the respondent. The last date for doing so was 4 October 1994. The respondent's solicitors waited for more than two months to be served with the notice of appeal. When this was not done, on 13 January 1995 they filed a motion to strike out the appeal. Notwithstanding that the appellant continued to do nothing. It was only on 13 January 1995, some three days before the respondent's motion was scheduled for hearing that the appellant decided to put in its application to have time extended for service of the notice of appeal.

[33] In dismissing the appellant's application, His Lordship Gopal Sri Ram JCA had this to say:

> In the present case, there was, as we have earlier observed, no reasonable explanation for the failure to serve and the delay in approaching the court. We took into account all that could belaid in favour of the appellant, and weighed it against all the other circumstances of the case. Having done this, and having considered all the relevant circumstances, we found ourselves unable to exercise discretion in the appellant's favour.

[34] In the present case, there is, as has been stated before, only one reason given for the delay, namely, defence counsel fault or mistake as a result of 'kesalah-fahaman saya keatas komunikasi-komunikasi mengenai tarikh-tarikh pemfailan Pembelaan'. The question to be considered at this stage is whether this reason amounts to a good reason for the court to exercise its discretion to allow an extension of time. What is the remedy for the defendant if the court refuses to exercise this discretion in his favour?

[35] In the case of *Tractors Malaysia Bhd v Southern Estates Sdn Bhd & Anor* [1984] 1 MLJ 118; [1984] 1 CLJ 154, the Federal Court had stated as follows:

> In the Federal Court we rule that mistake of appellants' solicitors on point of law by itself cannot constitute sufficient grounds for granting extension of time to file notice of appeal. For this legal proposition we have considered the decisions of this court in *Sri Jaya Transport Co Ltd v Fernandez* [1970] 1 MLJ 87 at pp 88–89;*Gan Hay Chong v Siow Kian Yuh & Anor* [1975] 2 MLJ 129 and *Hoe Joo Sawmills v Sigma (Air Conditioning) Sdn Bhd* [1979] 2 MLJ 236. The notice was filed more than three years out of time. As there are no special grounds shown for this court to exercise its discretion under r 56(a), we find this is not a proper case in which we should allow for extension of time.

[36] In the case of *Gurdev Kaur a/p Bhag Singh v BSN Commercial Bank (M) Bhd* [2002] MLJU 643; [2003] 1 CLJ 429, the only ground offered to explain

the delay in filing the proper notices of appeal was the former solicitors' alleged failure to exercise due diligence in handling the cases. As this was the only ground offered to explain the delay, the question for the consideration of the Court of Appeal was whether the applications ought to be dismissed for lack of merit and whether there was any recourse for further appeal to the Federal Court. There it was held by Richard Malanjum JCA as follows:

> In any event we did consider the grounds advanced in support of the two applications and we found no merit in them. In the first motion *the explanation given for the delay* in filing the proper notice of appeal against the order for sale *is squarely put to the former solicitor of the applicant* in that it was alleged that he did not do his work and he did not keep the applicant informed of the status of the case. *That is not a good reason for us to exercise our discretion* and grant leave. *The applicant can always seek remedy elsewhere if she has any grievance against her former solicitor.* It is settled law that mistake of one's solicitor is not necessarily a good excuse (see *Sinnathamby & Anor v Lee Chooi Ying* [1987] 1 CLJ 157; [1987] CLJ (Rep) 336; *Brijkishom & Anor v Lee Chooi Ying* [1987] 1 MLJ 110). (Empahsis added.)

[37] The defendant, on the other hand, relies on the case of *Idris bin Hj Salleh v Federal Auto Holdings Bhd* [1979] 2 MLJ 141 as the authority for the proposition that courts have allowed the filing of a defence after the time allowed for the filing of the same, albeit even after notice of judgment was served although not as yet obtained.

[38] In coming to a decision in respect of this application, the court has considered that the decision in *Idris bin Hj Salleh* is a decision of the High Court in 1979. Since then, there have been countless decisions of the Court of Appeal stressing the importance of observance of the time schedule provided by the rules. As stated by the House of Lords in the case of *Ketteman and Others v Hansel Properties Ltd* [1988] 1 All ER 38, 'We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age'.

[39] The court has considered that in this case although the defendant was well aware of the suit that had been filed against him by the plaintiff, he had insisted on strict compliance with the RHC 1980 as to service. The court is satisfied that the posting of the writ and statement of claim to him at his parents-in-law's address as well as the e-mailing of a copy to his e-mail address were meant to appraise him of the existence of such a suit and nothing more. It did not amount to service and the plaintiff has admitted that it was not service. The court notes that although defendant's solicitors had attended court to apply to set aside the alleged service of the said writ and statement of claim on the defendant, yet when that issue was subsequently resolved, the court was informed that they had no instructions to accept service on behalf of the defendant.

[40] As such, the plaintiff had no other option but to engage an agent to serve the defendant in the United Kingdom. This was duly done and appearance was entered on 20 June 2011. As such, the court finds the failure of the defendant to serve a copy of the defence within the time as stated in the RHC to be incomprehensible taking into account his own insistence that there should be due compliance with the rules.

[41] Before the court could consider whether there are merits in the defendant's case, the court must first consider whether there are good grounds for the delay. In this case, the court is of the view that no good ground has been shown for the delay. It is trite law that the mistake of the solicitor is not a good ground albeit the court is unable to see how in the circumstances there could be any mistake or miscommunication. After all the memorandum of appearance was filed by defendant's solicitors. The court is thus unable to see how a plea by the defendant's solicitors that the defendant should not be made to suffer as a result of the solicitor's mistake to amount to a good ground for the exercise of the court's discretion. If that were the case, we may well see the excuse of solicitor's mistake being advanced more frequently to overcome the delay or the indolence of a defendant or his counsel.

[42] As as been stated by the Court of Appeal in the case of *Gurdev Kaur Bhag Singh*, if the defendant has indeed suffered as a result of the admitted mistake of his solicitor, his proper remedy is against the said solicitor. In this case, the court is unable to see any basis to exercise its discretion to allow the defendant an extension of time to serve his defence. The court is unable to see any material on which the court is able to exercise its discretion on behalf of the defendant. Otherwise, as held by His Lordship Hashim Yeop A Sani in *Ong Guan Teck*, a party in breach of the rules would have an unfettered right to extension of time, which would defeat the very purpose and object of the rules.

[43] Accordingly, the court had dismissed the defendant's application in encl 11 with costs to be taxed unless otherwise agreed.

Defendant's application dismissed with costs.

Reported by Kanesh Sundrum.